

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1667

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

**NENG YEE LO, individually and for the
Next of Kin of PAO LO, deceased,
and as administrator of the
estate of the deceased and
XIONG THAO, individually and as mother
and natural guardian of KA ZONG LO, a minor,**

Plaintiffs-Appellants,

v.

**KOHL'S FOOD STORES, INC.,
a Wisconsin Corporation,
PINKERTON'S INC.,
a Delaware Corporation
and BLUE CROSS, BLUE SHIELD
UNITED OF WISCONSIN,**

Defendants-Respondents,

**WISCONSIN DEPARTMENT OF HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION,**

Defendant.

APPEAL from judgments of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Neng Yee Lo and Xiong Thao appeal from summary judgment dismissals of their negligence action against Kohl's Food Stores, Inc. and Pinkerton's, Inc.¹ They present two issues for review – whether the trial erroneously exercised its discretion when it “failed to order Defendant Kohl's to properly respond to legitimate discovery requests;” and whether the trial court erred when it granted summary judgment dismissal to Kohl's and Pinkerton's. We affirm the judgments because we conclude that the trial court acted within its discretion when it denied Lo and Thao's motion to compel discovery at the summary judgment hearing. Further, summary judgment was properly granted because the summary judgment materials established that Kohl's was not negligent as a matter of law, that Pinkerton's had no duty to the plaintiffs, and that there were no remaining genuine issues of material fact necessitating a trial.

¹ Neng Yee Lo filed suit, individually, and for the next of kin of his brother Pao Lo, the victim, and as personal representative of the Estate of Pao Lo. Xiong Thao, Pao Lo's widow, filed suit individually, and as mother and guardian of their child, Ka Zong Lo.

I. BACKGROUND

The underlying facts are undisputed. On June 14, 1991, after shopping at the Kohl's Food Store on West Juneau Avenue in the City of Milwaukee, Pao Lo and Thao returned to their car parked in the Kohl's parking lot. Lo placed the groceries in the back seat, and Thao got into the front passenger seat and closed and locked her door. Lo then got into the front driver's seat and started the car. At that time, an assailant entered Lo's vehicle from the unlocked rear passenger door. The assailant pointed a handgun at Lo's head and demanded money. The assailant then grabbed for Thao's purse and fired the handgun at Lo's face. He then fled from the car and was chased by a Pinkerton's security guard from the Kohl's store, but he escaped. Lo died from the gunshot wound. Police later apprehended the assailant, Steven Smith, who was charged and convicted of Lo's homicide.

In December 1992, Neng Yee Lo and Thao filed a negligence action against Kohl's and Pinkerton's for Pao Lo's death. Their amended complaint alleged that Kohl's:

[K]new or should have known of the robberies, purse snatching, and other criminal activities which all represent security risks or hazards to its customers, but was negligent in hiring, maintaining and monitoring security for the safety of its business customers coming and going out of its said premises.

The amended complaint alleged that Pinkerton's "was negligent in providing security to Pao Lo as a business customer of Kohl's." The negligence of both Kohl's and Pinkerton's was alleged to be the direct and proximate cause of injuries suffered by Pao Lo, his next of kin, his wife, and his daughter, including "great bodily pain and suffering;" "mental anguish;" "emotional distress;" and "loss of society, companionship, services."

Kohl's and Pinkerton's filed answers denying any negligence on their part and setting forth affirmative defenses. Each pleaded that any injuries or loss sustained by the plaintiffs was the result of either intentional or negligent

acts of another, constituting an independent or superseding cause. Further, Kohl's filed a cross-claim against Pinkerton's seeking, *inter alia*, contribution and indemnification if Kohl's was found liable at trial.

Later, both Kohl's and Pinkerton's filed motions seeking summary judgment dismissal. At the hearing on the motion, Lo and Thao alleged that Kohl's had not properly answered an interrogatory question regarding Kohl's knowledge of past incidents of crime at the West Juneau store. Kohl's had objected to the question, arguing that it was "overly broad, unduly burdensome, and [was] not reasonably calculated to lead to discovery of admissible evidence." Lo and Thao never moved the court to compel discovery. *See* § 804.12(1)(a), STATS. Thus, the summary judgment materials never included any admissible evidence on Kohl's knowledge of crime at the store. The trial court denied Lo and Thao's request that the trial court order Kohl's to answer the interrogatory question, agreeing with Kohl's that the summary judgment hearing was not the appropriate time to make such a request, and that Lo and Thao should have moved the court to compel discovery earlier.

The trial court granted summary judgment dismissal to both Kohl's and Pinkerton's, concluding that the summary judgment materials established that there were no genuine issues of material fact, and that as a matter of law there was no liability on the part of either Kohl's or Pinkerton's. Further, the trial court specifically found that the homicide "was a random act of violence which nobody could have anticipated except the perpetrators."

II. ANALYSIS

On appeal, Lo and Thao argue that the trial court prejudicially misused its discretion in failing to order Kohl's to respond completely to their proper discovery requests and that genuine issues of material fact exist necessitating a trial. We disagree.

A. Motion to Compel Discovery.

If a discovering party receives an answer to an interrogatory that it believes is evasive or incomplete, or fails to receive any answer at all, the discovering party may move the trial court for an order compelling discovery. See § 804.12(1)(a) & (b), STATS. Further, the burden is “on the frustrated party to seek a court order compelling compliance.” 3 JAY E. GRENIG & WALTER L. HARVEY, CIVIL PROCEDURE § 412.2 at 580 (2d ed., Wis. Prac. Series) (1994).

A motion for an order compelling discovery should be filed with the court and served on all the parties within a reasonable time after the moving party is served with the allegedly insufficient response to the discovery request or, if no response has been received, after the deadline for the response. The motion should be made in sufficient time so that it can be decided and the moving party can obtain the requested material before the trial and the discovery deadline.

Id. at 581 (footnotes omitted); see *Hertlein v. Huchthausen*, 133 Wis.2d 67, 71, 393 N.W.2d 299, 300 (Ct. App. 1986) (stating that § 804.12, STATS., provides various remedies to which party can avail itself if party is concerned about not receiving discovery materials). The question of whether to grant a motion compelling discovery is a matter within the discretion of the trial court and we will not reverse the trial court absent an erroneous exercise of that discretion. *Earl v. Gulf & Western Mfg. Co.*, 123 Wis.2d 200, 204-05, 366 N.W.2d 160, 163 (Ct. App. 1985).

In the present case, the trial court denied Lo and Thao's demand that Kohl's respond to their interrogatory question. Essentially, the trial court concluded that the plaintiffs should have moved the trial court earlier to compel discovery and that summary judgment was not the appropriate time for such a request. The trial court correctly applied the relevant law and thus could properly reach this discretionary decision. Accordingly, we will not reverse on this ground. *Id.*

B. Summary Judgment.

“Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and to avoid trials where there is nothing to try.” *Caulfield v. Caulfield*, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994) (citation omitted). While we apply the same methodology as the trial court when reviewing a summary judgment motion, we owe no deference to the conclusion of the trial court. *Novak v. American Family Mut. Ins. Co.*, 183 Wis.2d 133, 136, 515 N.W.2d 504, 506 (Ct. App. 1994). We first examine the pleadings to determine whether they state a claim for relief. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315-17, 401 N.W.2d 816, 820-21 (1987). If the pleadings state a claim and the responsive pleadings join the issue, we then must examine the evidentiary record to analyze whether a genuine issue of material fact exists or whether either party is entitled to a judgment as a matter of law. *Id.* Further, the claim should be dismissed only if it is quite clear that under no circumstances can the plaintiff recover. *Barillari v. City of Milwaukee*, 194 Wis.2d 247, 256, 533 N.W.2d 759, 762 (1995) (citation omitted). We address the claims raised against Kohl's and Pinkerton's *seriatim*.

1. Claim against Kohl's.

In *Radloff v. National Food Stores, Inc.*, 20 Wis.2d 224, 121 N.W.2d 865 (1963), the Wisconsin Supreme Court stated that:

[T]o establish negligence on the part of the proprietor it is necessary to show that the proprietor or his employees knew or by the exercise of reasonable care, could have discovered that such acts were being done or were about to be done by the third person so as to threaten the bodily security of other patrons on the premises.

Id. at 233, 121 N.W.2d at 870.

In the present case, there is no evidence in the summary judgment materials that Kohl's either knew or, by the exercise of reasonable care, could have discovered that Smith was about to rob and murder Pao Lo in the parking lot. There was no evidence that Kohl's was either aware of Smith's actions or

could have discovered the robbery. Smith's affidavit establishes that he and his alleged accomplice had only been on the premises for two minutes before the murder. Further, the summary judgment materials establish that the managers on duty were unaware of Smith's presence. From these submissions, the trial court could properly characterize the tragic shooting as a "random act of violence which nobody could have anticipated except the perpetrators."

Under *Radloff*, as a matter of law, Kohl's was not negligent and thus, the trial court properly granted summary judgment. See *Barillari*, 194 Wis.2d at 256, 533 N.W.2d at 762.

2. Claim against Pinkerton's.

The amended complaint alleged that Pinkerton's "was negligent in providing security to Pao Lo as a business customer of Kohl's." The summary judgment materials fail to establish that Pinkerton's owed a duty to provide security services outside the store where the shooting took place. The uncontroverted contract between Kohl's and Pinkerton's establishes that Pinkerton's, at the time of the shooting, was only contracted to provide "investigative services" for the Kohl's store. The uncontroverted affidavit of the vice president of investigations for Pinkerton's establishes that the investigative services were for inside the food store, and that it did not require Pinkerton's to provide any *security* services outside or inside the store. Indeed, another summary judgment submission established that Kohl's cancelled its contract for security services with Pinkerton's in 1989. Without evidence raising a genuine issue of material fact with regard to Pinkerton's actual duty to provide security to Kohl's customers outside the store, Lo and Thao's claims cannot survive the summary judgment motion. See *Jones v. Williams*, 408 N.W.2d 426, 428 (Mich. Ct. App. 1987) (concluding that summary judgment was properly granted to detective agency when contract established that agency had no duty to provide security services outside of restaurant and it was undisputed that victim was shot outside the building). Accordingly, summary judgment dismissal could be granted in favor of Pinkerton's because it is clear that under no circumstance could Lo and Thao recover. See *Barillari*, 194 Wis.2d at 256, 533 N.W.2d at 762.

By the Court. — Judgments affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.